is only based on conjecture. The reasoning on which all the cases have been decided does not logically leave room for any exception of this kind. If this result is inconvenient it can only be obviated by statute.

I think that the result would be the same in the case of any other kind of property and does not depend on the fact that the property in question is a ship and does not depend on the form of procedure adopted by the plaintiffs. The only relevant consideration is the fact that if these proceedings were successful they would have the effect of depriving the present Government of China of possession.

The writ and subsequent proceedings must be set aside with costs.

Order accordingly.

IN RE ABRAHAM PENHAS DECEASED.

[Court of Appeal (Murray-Aynsley, C.J., Laville and Evans JJ.) March 24, 1950]

[Singapore — Civil Appeal No. 21 of 1949]

Marriage — Validity of marriage of a Jew to a non-Christian Chinese lady — Requirements for the validity of marriage under the Common Law — Whether validity of marriage affected by personal disability of a Jew to marry a woman who was not a Jewess.

This was an appeal from the judgment of Mr. Justice Gordon-Smith (reported in (1949) M. L. J. 223). The learned trial Judge had found that the respondent, Tan Soo Eng, had gone through a form of marriage with the deceased, Abraham Penhas, and he held that the respondent was the lawful widow of the deceased. The appellant, Isaac Penhas, appealed and on appeal the questions raised were (a) whether the ceremony that took place was sufficient to create a valid marriage and (b) whether either or both of the parties was under any disability which prevented them from contracting a valid marriage.

Held, (a) that according to the English Common Law which applied in the Colony, the agreement **per verba de praesenti** of the parties to a marriage were sufficient in the absence of impediment to constitute a valid marriage; (b) that the evidence in this case showed that the marriage ceremony gone through conformed to the requirements of the Common Law and therefore the marriage was a valid marriage under the Common Law; and (c) that the marriage being valid under the Common Law was not rendered invalid by the personal disability of the deceased as a follower of the Jewish religion to marry a woman who was a non-Jewess.

Cases referred to :—

(1) *Reg. v. Millis* 10 Cl. & Fin. 534.
(2) *Wolfenden v. Wolfenden* (1946) P. 61.
(3) *Apt v. Apt* (1948) P. 86.
(4) *Srini Vasan (otherwise Clayton) v. Srini Vasan* (1945) P. 67.
(5) *Nachimson v. Nachimson* (1930) P. 217.
(6) *Hyde v. Hyde and Woodmansee* L.R. 1 P. & D. 130.
(7) *Choa Choon Neoh v. Spottiswoode* 1 Kyshe 216.
(8) *Ussher v. Ussher* (1912) 2 Ir. R. 445.
(9) *Khoo Hooi Loong v. Khoo Hean Kwee* (1926) A.C. 529 at p. 543.
(10) *Chetti v. Chetti.* (1909) P. 67.
(11) *Berthiaume v. Dastous* (1930) A.C. 83.
(12) *Maclean v. Cristall* 7 Notes of Cases, Supp. xvii.
(13) *Reg. v. Willans* 3 Kyshe 16.
(14) *Carolis de Silva v. Tim Kim* (1905) 9 S.S.L.R. 8.
(15) *Sunny Tay v. Seow See Neo* (1934) S.S.L.R. 88; (1934) M.L.J. 83.
(16) *Chia Teck Leong and Others v. Estate and Trust Agencies (1927) Ltd.* (1939) S.S. L.R. 94; (1939) M.L.J. 118.
(17) *Case of the Postnati* 2 State Tr. 559 at p. 638.
(18) *Blankard v. Galdy* 2 Salk. 411.
(19) *Campbell v. Hall* 20 State Tr. 239.
(20) *Braddell's Law of the Straits Settlements Vol. 1.*
(21) 1 Kyshe xviii.
(22) *In re Wilton* (1900) 2 Ch. 481.
(23) *Lautour v. Teesdale* 8 Taunton 830.
(24) *Petronella Case* (1926) A.C. 543.
(25) *Blackstone's Commentaries* Vol. 1 at p. 107.
(26) *Cooper v. Stuart* 14 App. Cas. 286.
(27) *Catterall v. Catterall* 1 Rob. 580.
(28) *Advocate General of Bengal v. Ranee Surnomoye Dossee* 2 Moo. P.C.C., N.S. 22.
(29) *Narayana v. Kannamma* A.I.R. 1932 Mad. 445.

CIVIL APPEAL from Judgment of Gordon-Smith, J.

John Laycock (*D. Murphy* with him) for the appellant.

Sir Roland Braddell (*Claude da Silva* and *G.E.N. Oehlers* with him) for the respondent.

Murray-Aynsley, C. J. : — In this case the facts lie within a small compass. There is a finding of fact that the respondent Tan Soo Eng went through a ceremony of marriage with the deceased Abraham Penhas. There is no attempt by the appellant to upset this finding of fact. All that this Court had to consider was whether the ceremony was sufficient to create a valid marriage, and secondly, if this were the case, whether either or both of the parties was under any disability which prevented them from contracting a valid marriage.

To revert to the facts. The deceased was a Jew by origin and at the time of the ceremony had not adopted any other religion or renounced the religion of his birth. The respondent was a non-Christian Chinese. Neither of the parties was married at the time of the ceremony. Both may be regarded as being domiciled in the Colony.

At the time of the ceremony the two could not have married by any of the statutory methods, which means that unless the method they adopted was effective they could not have married in the Colony.

The first question to be considered was, what was the law applicable to the question. I do not consider that at this time it is necessary to say more than that English law prevails unless its application would result in the infliction of injustice. If English law were to be applied to this case it would be the common law as it was before the numerous statutes, beginning with Lord Hardwicke's Act, were enacted.

For a long time the uncertainty as to whether the decision in *Reg. v. Millis*[1], applied outside England and Ireland led to doubts as to whether the common law could be applied to marriages in the Colony. Since the case of *Wolfenden v. Wolfenden*[2] (this was approved in the Court of Appeal in *Apt v. Apt*[3]) I think that it may be taken as settled that the doctrine of *Reg. v. Millis* has no application in the Colony and that the agreement *per verba de praesenti* is sufficient, in the absence of impediment to constitute a valid marriage. If this is the case I do not think that any question arises as to the common law being applicable to the Colony. The simple requirements of the common law are probably applicable to all or almost all the traditional or customary forms of marriage in use in the Colony. I doubt whether in any event the Courts could recognize a marriage not based on the consent of the parties.

I think that the law as to marriage in the Colony is made clearer by the decision in *Srini Vasan (otherwise Clayton) v. Srini Vasan*[4]. This case, I think, puts an end to the doctrine that what may be called non-European marriages were different in character from those contracted in Europe. It is now recognized that all types of marriage are essentially the same, provided that the status so created is of potentially indefinite duration, and not for a definite period of time (as may be contracted by Shias). *Nachimson v. Nachimson*[5] put an end to the idea that it was necessary for the marriage to conform more or less to the Christian type, a doctrine that was enshrined in the often cited *Hyde v. Hyde*[6].

I think it was ideas of the kind now exploded that caused Judges in the Colony in earlier times to doubt whether the common law doctrines as to marriage could be applied here. I do not think that these doubts have any validity in view of decided cases; (see, e.g. Sir Peter Maxwell in *Choa Cheow Neoh v. Spottiswoode*[7], reported in the Appendix to Wood's Oriental Cases).

The appellant did not in the appeal rely on the allegation that the deceased was monogamous by custom and the respondent polygamous. It was not proved that Jews in Singapore are monogamous and, in any event, it is hard to see how it could affect the present case, as no one has suggested that Chinese women indulge in polyandry. Here monogamy is a question of personal disability.

The marriage ceremony was of a type usual among Chinese. Whether or not it was effective as such is immaterial provided it conformed to the requirements of the common law, *Ussher v. Ussher*[8]. That it did conform to the requirements of the common law the evidence accepted by the learned trial Judge leaves no room for doubt.

The other question raised on behalf of the appellant was one of personal disability of the deceased, a Jew, to marry a woman who was not a Jewess. It may be conceded that by their rules the Jews are forbidden to contract marriages with outsiders and that orthodox Jews would regard a marriage such as that under consideration as invalid. But it would be begging the question to consider these rules as law. In this Colony they are only the rules of a voluntary body like those of any religious sect. Unlike the Turkish Empire or even India, the Colony has never been a country of personal laws. Except where provision has been made by statute such questions as age of majority, distributions, testamentary capacity, have been regulated by the general law. There have been cases of mixed marriages before the courts. There has never been a case where it has been decided that by reasons of personal law a marriage has been invalid. There is further no authority for the proposition that the custom of the husband should prevail over that of the wife (See also the remarks of Lord Phillimore in *Khoo Hooi Loong v. Khoo Hean Kwee*[9]).

Even where by the law of the domicile such prohibitions exist in the case of marriages within the jurisdiction English Courts will not recognize them (see *Chetti v. Chetti*[10], *Dicey* 6th Ed. Rule 169, exception 1).

The disability attaching to the deceased, if any, would attach to him only as a member of a religious body and he could at any time by his own volition get rid of that disability.

In the circumstances I considered that the marriage under consideration was good and valid and that the appeal should, therefore, be dismissed.

Laville, J. : — I have had the advantage of reading the judgment of the learned President of the Court of Appeal and have, for the reasons set out below, reached a similar conclusion.

A marriage is valid everywhere if it is valid in the place it was effected between persons having capacity for it, *Berthiaume v. Dastous*[11].

As to capacity there is no evidence that either party taking part in this ceremony of marriage between Abraham Penhas and Tan Soo Eng was anything but *solutus*, i.e. free to marry. It was said by Lord Phillimore in *Khoo Hooi Loong v. Khoo Hean Kwee*[9] that "if the woman be free to contract marriage, *soluta*, and the man according to his personal law is also free, *solutus*, and the particular class of marriage or union is in the abstract recognised by the law of the land, it may well be that the religious obstacle is no bar". It follows that the religious rule that a Jew cannot marry anyone save another Jew is not effective to render void a marriage recognised by the law of the land.

What was the law of Singapore as to marriage when Abraham Penhas married Tan Soo Eng? Marriages between Christians according to their ceremonies were accepted by the law. Polygamous marriages of Chinese were accepted, and also polygamous marriages of Muslims and of Hindus, provided the ceremonies attending the marriage complied with their personal religion or custom. As to "mixed marriages" contracted by people of different religions or marriage customs, the Christian Marriage Ordinance provided a means of making a valid marriage where one party was a Christian and the other not. But in addition to this it had been stated by Lord Phillimore in the case previously cited that there seemed to be no reason why a Christian woman could not be a 'tsip', i.e. a Chinese secondary but legal wife, even without any ceremony to mark the adoption of such a status, but merely by acquiescence on her part and introduction of her as such on the husband's part into his family.

This seems to establish that no religious ceremony, nor indeed any ceremony, was needed for a valid marriage between persons of different religions and customs. It remains that the essence of a valid marriage in law in the Colony is intention on both sides to contract a permanent union, and an agreement to do so expressed to or made apparent to witnesses.

It was argued by the appellant that the only common law marriage that could be recognised in the Colony was one that complied with what was the common law of England in 1826 which was introduced into the Colony at its birth. That law acknowledged only a marriage before an ordained priest. Therefore a Chinese and a Jew, being of different religions and customs, could not contract a legal marriage in the Colony except before an ordained priest.

But it has been authoritatively laid down in *Maclean v. Cristall*[12] that colonists take to a colony only so much of the English Common Law as is applicable to the conditions there. It is also laid down in *Regina v. Willans*[13] that it is the Courts of the Colony which must decide how much of the common law is applicable.

It is clear that the Courts of this Colony from the very beginning have decided that the English Common Law requirements for a valid marriage could not be made applicable to the conditions in Singapore Colony and relaxed them in the case of Chinese marriages and Muslims and Hindu marriages; in such cases, however, they could still preserve some sanction for the marriage ceremony, but it is clear that the Courts, when the cases of mixed marriages arose, were forced to abandon the insistence on religious ceremonies of the English Common Law, and thrown back on to the basic essence of marriage, to wit, an agreement between two parties. That appears to be the only quantum of the common law as regards marriage which the Courts have decided is applicable to the conditions in the Colony of Singapore.

This is plainly discernible in the history of the cases dealing with mixed marriages which have come before the Courts of the Colony.

In 1902 the case of *Carolis de Silva v. Tim Kim*[14] established that a Chinese woman and a Singhalese could by mere *verba de praesenti* contract a legal marriage.

In 1926 the case of *Khoo Hooi Loong v. Khoo Hean Kwee*[9] adumbrated the final abandonment of any necessity for a ceremony at all, and the possibility that a Christian Eurasian could contract a legal polygamous marriage with a Chinese.

In 1934 the case of *Sunny Tay v. Seow See Neo*[15] shows acceptance of a Japanese woman as a legal 'tsip' of a Chinese husband.

In 1938 in *Chia Teck Leong and Others v. Estate and Trust Agencies (1927) Ltd.*[16] it was held that

a professing Christian woman could contract a legal secondary marriage with a Chinese.

I hold therefore that the Common Law of England as to marriage as introduced into the Colony in 1826 was applicable to the marriage of Abraham Penhas and Tan Soo Eng as modified to suit the conditions applicable in a colony where people of different races, customs and religions are domiciled and inter-marry, and that the English Common Law in such cases is satisfied by a marriage *per verba de praesenti* and that the marriage of Abraham Penhas and Tan Soo Eng was good and valid, and the appeal should therefore be dismissed.

Evans, J. : —This is an appeal from a judgment of Gordon-Smith J. wherein he found that the deceased Abraham Penhas was lawfully married to the respondent on or about 22nd December 1937. The only point argued before us was the validity of that marriage. The deceased was a Jew and a British subject.

The learned Judge found :—

"The plaintiff suggested a marriage ceremony but the deceased said that this was not possible in the Jewish Synagogue and on her suggesting a marriage according to Chinese rites and on being supplied with details, the deceased agreed. A day was appointed and a ceremony took place just before Christmas 1937. Both the plaintiff and her mother and another guest who were present have described this ceremony in detail. The deceased had already given the mother $500/- for the expenses of the wedding and wedding feast. On the appointed day the deceased arrived with two Jewish friends and an old Chinese gentleman. The ceremony consisted of the bride and bridegroom (the plaintiff and the deceased) standing before the old Chinese gentleman who made some sort of speech referring to the auspicious occasion and then formally asked them separately whether they were willing to become man and wife and they both responded in the affirmative. During this procedure the plaintiff was holding joss-sticks bowing and worshipping. The deceased produced a handkerchief with which he covered his head, raised his right hand and was murmuring something in his own language. After this ceremony the happy couple then paid their respects to and offered the mother a cup of sweet tea in accordance with the Chinese custom. The two Jewish friends shook hands with the bride and kissed her. Following on this ceremony the usual wedding feast took place at which there were about seventeen guests. The deceased remained the night there, going to business as usual the next morning. According to the evidence the deceased would spend three or four nights a week at 508 Sims Avenue regularly except when he was away on business trips and this continued right up to the fall of Singapore in February 1942."

After discussing the law he held :—

"In my opinion the whole matter is one of a consensual marriage, i.e., a matter of contract. Neither party was incapacitated in law or otherwise from entering into such a contract and there is abundant evidence to shew not only that such contract was entered into but that the same was fulfilled and carried out right down to the date of the death of one of the parties."

It will be observed that he did not find that any Chinese custom had been proved, nor that the marriage was in accordance with such custom, nor that such custom was applicable to the deceased.

A large number of grounds of appeal are set out in the notice of appeal, but the appeal was in fact argued on two principal grounds alone, that the acts performed did not constitute a Jewish marriage, and the deceased was capable of marrying by Jewish law alone, and secondly that the judge was wrong in finding a common law marriage *per verba de praesenti,* for the English law always required the presence of a priest, where procurable, and the law laid down *Reg. v. Millis*[1] is applicable to this colony.

On the former points a number of cases were cited as to the requirements of Jewish law, and the recognition of Jewish marriages at English law. These were in my opinion irrelevant. The respondents have always said that the deceased said a Jewish wedding was impossible, nor is there any suggestion that any such marriage took place. These cases were, at best, conditionally relevant on the second part of this argument being true. If the deceased was incapable of contracting any kind of marriage other than Jewish, then admittedly no Jewish marriage has taken place.

The Jewish law is said to hold a Jew incapable of any gentile marriage. This again may be so but is beside the point. The question in this case is not in the first place what Jewish Law provides though that question might arise if it could be invoked by the parties or were required by the law. The first question here is the effect of the transaction between the parties by the law of this colony. The Jewish law may enter into consideration of that question, but the question of what marriages that law recognises is in itself irrelevant.

Much the same argument was advanced from another side. This, it was said, is a matter of Succession and must be decided by the "personal law" of the deceased who was a Jew. Much of the language used would have seemed appropriate to matters of Indian Law.

The expression personal law is highly ambiguous. It is used in rules of Private International Law applicable to similar cases, but here both parties were British Subjects, locally domiciled, and no such rules apply.

As the matter concerns a Jew, and reference was made to Greek marriages in Turkey, one may perhaps take a somewhat extensive view of the matter. An origin of some ideas of personal law may be in the decrees of Julius Caesar, and the early emperors, which are said to have allowed the Jews to live under their own law in Alexandria and other places in the Levant, outside their own country. The Christian Empire seems to have sought an uniformity of law, and the

heterodox sects, and more particularly the Jews, who regarded excessive uniformity as oppression, assisted and welcomed the Arab invaders. Islam, like the Jews, having law and religion fused, had no law generally applicable to non Moslems, and a Greek marriage, of the kind referred to, would there under the Turks be pronounced upon by a Greek court administering still, or at least until recently, the Basilica of Basil the Macedonian. Similarly a Jew marriage might be adjudged by a Jewish court. Under such system the religious law is interpreted, if not enforced, by priests or judges practising and living under that law. The Moslem conqueror of India probably encountered similar problems, but their solution is not of importance, as the English courts, though they may have copied them, did not profess to follow them.

The rules of the Common Law determining the law of newly acquired territory have been more stable than the language of the cases suggests. In the case of the *Postnati* (1608)[17] Lord Coke reports that on conquest of a Christian country the laws of that country continue in force until new provision is made by the conqueror, but on conquest of a pagan country the pagan laws are revoked. In *Blankard v. Galdy* (1693)[18] the case of an uninhabited country newly found is put; into such country English subjects are said to carry the Common Law by settlement. *Campbell v. Hall* (1774)[19] arose in Grenada, recently conquered and ceded, and is cited as a leading case, though its development of the law seems mainly verbal. That court approved the example of Minorca and held that the continuing law of the conquered country was, while it remained in force, equally binding on the conquered. Minorca was a Christian island. The decision reported by Coke is somehow scouted as "extra judicial", being considered perhaps not "rationalistic". This decision seems singularly unaffected by actual contemporary events in India, where the conquerors, like, no doubt, their Moslem predecessors, did not submit to any continuing local law. No reference seems to be made to settlement, and English law is said to have been formally introduced in Calcutta by Charter in 1726. What is there called personal law is said to spring from Warren Hastings Reg. II of 1774, the reported provisions of which, as to Calcutta and Bombay, seem to find statutory authority in sections 17 and 18 of 21 Geo. III c.70 :—

"XVII. Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William in Bengal, shall have full Power and Authority to hear and determine in such Manner as is provided for that purpose in the said Charter or Letters Patent, all and all Manner of Actions and Suits against all and singular the Inhabitants of the said City of Calcutta; provided that their Inheritance and Succession to Lands, Rents, and Goods, and all Matters of Contract and Dealing between Party and Party, shall be determined, in the Case of Mohamedans, by the Laws and Usages of Mohamedans, and in the Case of Gentus, by the Laws and Usages of Gentus; and where only one of the Parties shall be a Mohamedan or Gentu, by the Laws and Usages of the Defendant.

XVIII. And, in order that Regard should be had to the civil and religious Usages of the said Natives, be it enacted, That the Rights and Authorities of Fathers of Families, and Masters of Families, according as the same might have been exercised by the Gentu or Mohamedan Law, shall be preserved to them respectively within their said Families; nor shall any Acts done in consequence of the Rule and Law of Cast, respecting the Members of the said Families only, be held and adjudged a Crime, although the same may not be held justifiable by the Laws of England."

The term itself received statutory authority in the Government of India Act, 1915 section 112 :—

"112. The high courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject."

The local law flows from Penang. The early conditions there have been the subject of judicial consideration and of some differences of opinion. These matters are set out sufficiently, for our purpose in pages 4, 5 and 6 of *Sir Roland Braddell's book*[20]. The question is left open whether the origin lies in cession or in settlement.

Sir Benson Maxwell speaks in *Reg. v. Willans*[13] of the personal law of the garrison. I find difficulty in attaching any exact meaning to this. In India, although the English law was in a sense the personal law of the invader, it is not so called, but the term applies to the exceptions to it. The term, as generally used, seems to imply competing systems, the personal law of one subject being different from his neighbours. On the facts propounded by both judges and described by others, there seems to have been no sufficient law administered on the island, nor a resident population.

The practice, and the decisions, seem to rest at bottom less on the mode of acquisition, which is not important, than on the questions of the pre-existence of a system of law, the character of that law, and the continuance of a substantial population observing it. Settlement of vacant lands seems of greater force than cession. The whole Territory of Louisiana was ceded, but the French Law surviving seems to be confined to the State. Or to take a nearer and more certain example; half the peninsula of Sierra Leone was ceded by the local king, and immediately settled by British Subjects from England and later from Nova

Scotia and from Jamaica. It has always been held the Common Law was introduced by settlement.

The "Legal Chaos", as it is called, of the early years seems to have occasioned undue difficulties. Theoretically it would seem of small moment. The Law in force and the law enforced are not the same matter, nor after a period of disorder does the law require re-enactment. Reference was made before us to the opinions of Mr. Dickens. There is no recorded decision of that Recorder, even were it binding on this court. His complaints are many and varied. His chief complaint is the lack of Ecclesiastical jurisdiction, and of Common Law officers. It is true he speaks of the law of nature, yet professes to act on the "principles of the Criminal Law of England which are not local but universal" and expresses an intention to continue to do so[21]. Some of his views would imply that he regarded the Common Law as in force, even if unenforceable. Moreover as I understand the law, the effect of settlement follows quite independently of the opinions of local officers, or the possible neglect of the East India Company, but as the inherent right of British subjects. The establishment of Common Law courts, or assemblies as contemplated in Grenada, might require freeholders, or a royal commission and the mere introduction of Common Law would not seem to vest in the Company or its officers any jurisdiction over British subjects. Such jurisdiction depends on the "Charters". By the Letters Patent of 27th November 1827 (p. 21) and those of 10th August 1855 (p. 13) conferring jurisdiction, the application of the English Law in Ecclesiastical jurisdiction is restricted "as the several, religions, manners and customs of the inhabitants of the said settlement ..... will admit." This is a third and totally distinct system of personal law, if it can be described as such at all. It is at once more general and less strict than the Indian provisions. I cannot understand Sir Benson Maxwell's *dictum* as showing any pre-existing or other form of personal law.

Under the first form of personal law the succession would be in a Jewish Court and Jew law would probably be applied. Under the Indian, the defendant's law is to prevail, but no similar law is imported here. Here is full religious freedom. A man may quit a community or seek to relax its restraints. If a man change his faith under the first system, he will be, to some extent, outlawed, unless at the same time he acquire a right of suit in another court. Under the second, the form of action seems to determine the law applicable, but here the Common Law is applicable to all, where the customs of the inhabitants admit. The inhabitants are said to have been a few nomadic fishermen, and this provision has generally to be applied to a population mainly foreign. I understand it to mean, that these customs should be applied where to ignore them would cause substantial injustice or hardship.

The transaction must first be considered at Common Law. Where the parties are of different communities, this would normally be the only law applicable. In England there has been no difficulty in applying Common Law to Jewish Marriages, nor can the appellant, though asked to do so, refer us to any case in which it was held that Jewish law ousted the Common Law, or that a Jew was under a personal incapacity to contract a Common Law marriage. *In re Wilton*[22] and *Chetti v. Chetti*[10] would appear clear authority to the contrary. The latter decision turned largely on the husband's personal law which expression there had the double meaning of his law of domicile and his Indian personal law as a Hindu. Neither consideration applies here. Sir Gorall Barnes also attached importance to his supposed capacity to change his status. There is certainly nothing at Common Law to prevent a Jew from quitting his religion, or community. A prohibition by Jewish Law would be ineffective. The facts that the woman contemplated a Chinese wedding, and that the husband seems to have imported certain available requirements of Jewish law, while some evidence of consensus, are alike inoperative to prevent the marriage taking effect, if possible, at Common Law. *Lautour v. Teesdale*[23].

Carolis de Silva v. Tim Kim[14] is a Selangor case on which the above consideration have little bearing. It is quite irrelevant to the present case. In *Sunny Tay's* case[15] Chinese law was applied, and was, apparently assumed to be the only law applicable but that, I think, has no application here. *Chia Teck Leong v. Estate and Trust Agencies (1927) Ltd.*[16] was decided on questions of Limitation of actions, and laches, and the greater part of the judgment seems to be *obiter dictum*. It is not binding on this court and so far as it may be authority for either the proposition that Chinese custom is a common law available to anyone, or that such cases must be decided by the law of the deceased only, I would not be prepared to follow it. The latter proposition is in effect introducing the Indian rule, for which I can see no justification. In these cases of succession to a Chinaman, if there be any truth in the frequent assertion, that at Chinese law every recognised son has a share in the succession, the validity of the marriage is irrelevant, and reference to this merely excludes adoptives in defiance of the actual Chinese custom.

The marriage seems indeed to be presumed, less from the evidence of marriage, than because it is thought the son should succeed. The *dictum* of Lord Phillimore in the first *Petronella Case*[24], is not greatly in appellant's favour, and I do not think the expression personal law is intended to include a Jewish prohibition of marriage with a Gentile. This passage would allow of both parties contracting at Common Law.

That this transaction could not constitute a marriage at Common Law was the second part of the appellant's case. Mr. Murphy put forward a very interesting argument that some of the Lords and the Lord Chief Justice in *Reg. v. Millis*[1] regarded that decision as applicable to Common Law marriages in the colonies. He contended that the presence of an episcopally ordained priest, if procurable, was necessary to the validity of a marriage. The onus of showing impossibility lay on the respondent. It was, he said, possible in Singapore in 1937 to procure a priest. The Common Law is imported as a whole and the courts cannot pick and choose the rules or vary them as to do so would be an act of judicial legislation.

The very basis of the argument is not very strong. It is the Lords whose opinion did not prevail who harped on the danger attendant on the contrary opinion. Those whose opinion Mr. Murphy asks this court to follow do not seem to have committed themselves to any such general and unnecessary proposition. It is, at best, a statement of consequences, but of consequences which depend entirely on whether and to what extent the Common Law has been introduced into a particular Colony. If that introduction were complete the statement might be true. The Common Law introduced here is limited by the words of the Charter. This makes no reference to local law, personal law nor religious law; the words used are far wider and vaguer if less obligatory. Nor is this the only limitation. Blackstone in a passage frequently quoted in connection with settled Colonies says "Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony" — he mentions certain branches of law not so applicable, and not here relevant, and goes on — "and a multitude of other provisions are *neither necessary nor convenient* and therefore are not in force. What shall be admitted and what rejected, *at what times* and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in *Council;*"[25]. As Lord Watson points out in commenting on this in *Cooper v. Stuart*[26], and as Blackstone seems to intend in the words "at what times" the law introduced is itself living and capable of further development or exposition, and of supplement from the same source. There is, thus, a further limitation, to the law applicable at the time of introduction as being necessary or convenient. This limitation applies to the whole Common Law; that in the Charters to the jurisdiction of the Ecclesiastical Courts. These limitations are not in any way in conflict. The latter is a matter primarily of the jurisdiction of the court established and the former of the law introduced. The latter could, I think, only vary the former by specific addition or subtraction. In fact the Charters name certain wide matters to be given first importance in deciding what is "applicable, convenient or necessary."

Since the time of *Reg. v. Millis*[1], *Catterall v. Catterall*[27], *Maclean v. Cristall*[12] and *Wolfenden v. Wolfenden*[2] have been decided, and each case has held that the Common Law as expounded in *Reg. v. Millis*[1] was not in force in the territory concerned. In the last case there was no British settlement to limit the Common Law applicable and the law applied seems to have been the jurisdiction of the consular courts. Mr. Murphy would have us say that this recent case was really decided on the ground that an episcopally ordained priest was not procurable at Ichang. It is a reason unknown to Lord Merriman President who repeatedly speaks of the law as regards England and Ireland, rather than the Common Law, and whose language at page 543 is unambiguous when speaking of New South Wales (*Catterall v. Catterall*[27]) and Bombay (*Maclean v. Cristall*[12]) he says: "In such a territory as this (Ichang) there is, so far as the requirements of English Law are concerned in relation to a Common Law marriage, no obligation that the ceremony shall be performed in the presence of an episcopally ordained priest."

The appellant reinforces this argument with one that what he says is the law of marriage at Common Law, must, if applied, be introduced as a whole or as a whole rejected. There is, however, no unit of law such as this argument assumes, and every classification of law involves arbitrary divisions. We are told that to omit any factor of that law would amount to an act of judicial legislation a highly reprehensible act, it would seem. Whatever may be thought of the legislative fruits of Benthamite theory, there is no question here, I think, of judicial legislation. Blackstone was, it is true, unenlightened by Bentham, but, in the passage quoted, he ascribes this very function to the "provincial judicature;" and the courts have everywhere performed it. Neither here nor elsewhere has

the Common Law been introduced in accordance with the principles suggested. Clearly in *Wolfenden's* and the preceding cases the courts introduced the law only so far as applicable. In rejecting the requirement of a priest, they hardly stretched their authority far. In *Advocate General of Bengal v. Ranee Surnomoye Dossee*[28], when not dealing with a colony by settlement, but acting on similar principles, Lord Kingsdown would have discarded in addition to the Common law of suicide and forfeiture therefor, the matter then under discussion, the crimes of carnal knowledge of a child of ten and bigamy. While in *Narayana v. Kannamma*[29] the High Court of Madras, apparently regarding as anomalous the rule of Common Law, that, in an action for slander, a woman suing in defence of her chastity must, like most plaintiffs, prove special damage, refused to apply that rule of the law of slander, and, in rejecting it, seem, in fact, to have enacted for their jurisdiction the Slander of Women Act 1891.

As I understand the principles on which this court should act, we have not only authority, but are under a duty, to consider both what law is applicable and how far it is applicable. In a country where priests are few and there is no true parochial system, where the vast majority are non Christians it seems to me neither convenient nor necessary that two persons, such as these, should be required to call in an episcopally ordained priest to effect a marriage. I can see no reason to apply the personal law of one party more than that of the other. The application of the husband's "personal law," far from being necessary to avoid injustice would, in my opinion, only lead thereto, by depriving this woman who seems to have been induced to regard herself as a wife, and the child, whose paternity is not denied on any substantial ground, of what may be called their natural rights.

Appeal dismissed.

RUNME SHAW v. HABIBULAH.

[Orig. Civ. Juris. (Thorogood, J.) March 31, 1950]

[Singapore — Suit No. 571 of 1949]

Landlord and Tenant — Control of Rent Ordinance, 1947, s. 14(1)(j) — What constitutes a sub-letting — Licence to use part of premises.

In this case the plaintiff claimed possession of the premises, No. 163 North Bridge Road, on the ground that the tenant, the defendant, having sublet part of the premises received in respect of such letting rents exceeding 75% of the rent paid by him to the plaintiff. The defendant denied that he had sublet the premises and contended that he had only given licences to use parts of the premises to the persons concerned.

Held, that on the facts it appeared that the defendant did not in fact and did not intend to give exclusive possession of any part of the premises to the persons concerned and therefore the defendant had not sublet the premises or any part thereof.

Cases referred to :—

(1) *Clore v. Theatrical Properties Ltd.* (1936) 3 All E.R. 483.

(2) *Rendell v. Roman* (1893) 9 T.L.R. 192.

(3) *Taylor v. Caldwell* (1863) 122 E.R. 309.

CIVIL SUIT.

M. Brash for the plaintiff.

R. Boswell for the defendant.

The facts and arguments sufficiently appear from the Judgment.

Cur. Adv. Vult.

Thorogood, J. : — This is an action for possession of premises known as 163, North Bridge Road which premises consists of a shop, a bedroom and a kitchen.

The plaintiff is the owner. The defendant is the recognised tenant and is in possession.

The plaintiff gave defendant notice to quit on or about 14th July 1949, such notice expiring on the 31st August 1949. The plaintiff now claims possession of the premises under the provisions of Section 14(1)(j) of the Control of Rent Ordinance No. 25 of 1947 on the grounds that the defendant having sub-let part of the premises received in respect of such letting rents exceeding 75% of the rent paid by him to the plaintiff.

The defendant held the premises from plaintiff at a monthly rental of $218/75 and made arrangements with two persons namely A. Z. Mohamed Ally and Hargopal Sachdeva by which the two latter were allowed portions of the shop on payment by them to the defendant of sums amounting to $240/- per month in 1948 and thereafter to $230/- per month to September 1949. Charges for Municipal Services which it was agreed, did not amount to more than $26/- a month were paid by the defendant.

For the plaintiff, Mr. Brash maintains that the position as regards A. Z. Mohamed Ally and Hargopal Sachdeva is the same but Mr. Boswell for the defendant contends that if either of these two persons is not considered a sub-tenant of defendant, then the plaintiff's case fails as neither of them singly paid the defendant as much as 75% of the rent paid by defendant.

The only question is whether the arrangements between defendant and both of the other two users of the shop amounted to sub-letting of parts of the premises as submitted by the plaintiff or to the giving